JAMES A. AND RUTH K. SIMPSON

IBLA 93-649 Decided June 28, 1996

Appeal from a decision issued by the Area Manager, Kingman Resource Area, Arizona, Bureau of Land Management, asserting Federal ownership of sand and gravel and approving mineral material sale AZA-27916.

Affirmed as modified; request for attorney fees denied.

1. Patents of Public Lands: Effect

A patent without reservations passes fee simple title to public land from the United States to the grantee. After a patent has issued, questions of property rights are governed by state law.

2. Acquired Lands

In Arizona a general reservation of minerals reflects an intent to sever the surface estate from the underlying mineral estate, creating two distinct, coexisting, and individually valuable estates. The grantor retains ownership of all commercially valuable substances separate from the soil, and the grantee assumes ownership of the surface. The manner of enjoyment of the mineral estate is through extraction and removal of substances from the earth, and enjoyment of the surface is through the retention of such substances as are necessary for the use of the surface. Severance of "minerals" is construed as severing from the surface ownership substances which are valuable in themselves, apart from their location in the earth, and nothing presently or prospectively valuable as an extracted substance is excluded from the mineral estate.

3. Equal Access to Justice: Adversary Adjudication Generally--Equal Access

An application for an award of attorney fees and expenses is properly denied when there was no adversary adjudication as defined by 43 CFR 4.603(a).

APPEARANCES: John E. Lindskold, Esq., Golden, Colorado, for appellants James A. and Ruth K. Simpson; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

James A. and Ruth K. Simpson have appealed a June 17, 1993, decision by the Area Manager, Kingman Resource Area, Arizona, Bureau of Land Management (BLM), holding that the Federal Government owns the mineral rights, including sand and gravel, in acquired Federal lands described as Government Lots 1 and 2, sec. 3, T. 18 N., R. 18 W., Gila and Salt River Baseline and Meridian. The Simpsons, who are the owners of the surface estate, have appealed the BLM determination that the Federal Government owns the sand and gravel in those lands.

A Federal patent to the lands was issued in 1923, pursuant to the Act of July 27, 1866 (14 Stat. 292). That Act granted every alternate section of nonmineral public land, designated by odd numbers, to the Atlantic and Pacific Railroad Company (A&P). After conveyances having no consequences regarding the matter before us, Lots 1 and 2 became the property of the New Mexico and Arizona Land Company (the Land Co.).

The surface and mineral estates were split by a March 28, 1958, conveyance when the Land Co. excepted and reserved "all oil, gas and minerals underlying and appurtenant to said land, together with the right of ingress and egress and of prospecting, developing and operating said land therefor, and removing the same therefrom." The Simpsons acquired Land Co.'s grantee's title by deeds dated January 16 and November 1, 1978, subject to the mineral interests reserved in the 1958 deed. The Federal Government acquired the reserved mineral interests on June 1, 1988, when it completed a land exchange with the Land Co. pursuant to section 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1994).

In May 1993 the Simpsons were approached by Staker Paving Company (Staker) who sought to purchase sand and gravel from the bed of Black Rock Wash which runs across lots 1 and 2 (Affidavit of James Simpson at 2) for a road resurfacing project (EA at 2). When the Simpsons discovered that the United States held the mineral estate, they asked BLM for assurance that it would not claim ownership of the sand and gravel. On June 17, 1993, BLM issued its decision asserting ownership of the sand and gravel. 1/

1/ The stated basis for its determination was Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983). However, the decision also asserted that the Federal Government had acquired the mineral rights in the June 1, 1988, conveyance. On appeal all parties agree that Western Nuclear is not controlling, and that any rights the Federal Government holds must be derived from the June 1, 1988, conveyance.

Based on the June 17, 1993, determination, BLM proceeded with a mineral materials contract for the sale of sand and gravel to Staker. Sales Contract No. AZA 27196 provided for the severance, extraction, or removal of 30,000 cubic yards of the sand and gravel from lots 1 and 2, sec. 3, T. 18 N., R. 18 W., Gila and Salt River Baseline and Meridian.

The Simpsons have appealed the determination of Government ownership, asserting that, under Arizona law, the sand and gravel were not retained minerals which could be acquired by the Federal Government in 1988. The Simpsons seek a sum in the amount of the royalty paid to the Federal Government, interest, and attorney fees and other costs under the Equal Access to Justice Act. 2/

The first issue we will consider is the scope of BLM's decision. The Simpsons state that BLM has claimed ownership of all sand and gravel in the NE¼ of SW¼ and the S½ of NE¼ of sec. 3, T. 18 N., R. 18 W., Gila and Salt River Baseline and Meridian (Appellants' Reply at 3). BLM states that the commercially valuable sand and gravel, which is distinct from the soil itself, is located in the Black Rock Wash. It describes that deposit as being thicker and thus distinct from the surface because it has been reworked by occasional flash flooding (Answer at 13-14). However, the June 17, 1993, BLM decision declares Federal ownership of the sand and gravel in lots 1 and 2, so the issue is not limited to the sand and gravel in the Black Rock Wash.

[1] Ownership of the sand and gravel in lots 1 and 2 is a matter of State law. When the Federal patent was issued, A&P received fee simple title pursuant to the railroad land grant statute, and that title included subsequently discovered minerals. See Burke v. Southern Pacific R.R. Co., 234 U.S. 669 (1914); Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 239-40 (1914). Therefore, upon issuance of the patent in 1923, the Federal Government retained no interest in minerals in the conveyed land. The mineral interest was severed from the surface interest when Land Co. sold the surface rights, and its retained mineral interest was later conveyed to the United States. The United States could acquire no more than the interest the Land Co. had retained when the mineral estate was severed. The legal interpretation of the document conveying the surface and retaining the mineral is governed by the laws of the state in which the land is situated. Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 361, 372 (1977). Therefore, Arizona State law must be applied to determine what was conveyed to the Federal Government in 1988.

2/ Appellants state in their reply brief that Staker Paving Company had completed removal of the sand and gravel in December 1993 under the mineral material sales contract issued by BLM.

The March 28, 1958, conveyance document reserved "all oil, gas and minerals underlying and appurtenant to said land, together with the right of ingress and egress and of prospecting, developing and operating said land therefore, and removing the same therefrom." As can be seen, the deed did not state whether the title to the sand and gravel was being retained or conveyed. Therefore, we must determine whether sand and gravel is included in a general mineral reservation under Arizona law.

[2] The Simpsons and BLM both cite Spurlock v. Santa Fe Pacific R.R. Co., 694 P.2d 299, 143 Ariz. 469 (Ariz. Ct. App. 1984), cert. denied, 472 U.S. 1032 (1985), as the expression of controlling State law on interpretation of a clause retaining mineral rights. In that case the Arizona Court of Appeals adopted the line of cases treating the term "minerals" as unambiguous, making it the court's duty to determine the extent of a general reservation as a matter of law, without resorting to extrinsic evidence to establish any unexpressed subjective intent of the parties. Id. at 308. The court stated that, as a matter of law, a general reservation of minerals

> reflects a general intent of the parties to sever the surface estate from the underlying mineral estate * * * [and] to create two distinct, coexisting, and individually valuable estates. * * * [T]he grantor retains ownership of all commercially valuable substances separate from the soil, while the grantee assumes ownership of a surface that has value in its use and enjoyment. [Emphasis in original.]

Id. The court quoted 1 E. Kuntz, A Treatise on the Law of Oil and Gas § 13.3 at 305-06 (1962):

> The manner of enjoyment of the mineral estate is through extraction and removal of substances from the earth, whereas the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment should be taken into account in arriving at the proper subject matter of each estate. The severance of "minerals" generally should be construed to sever from the surface ownership all substances presently valuable in themselves, apart from their location in the earth, whether their presence is known or not known, and all substances which become valuable through the development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

Spurlock v. Santa Fe Pacific R.R. Co., supra at 308-09.

The Arizona Court of Appeals held that a general reservation created coexisting and individually valuable estates. By splitting the estates the grantor and grantee recognized that one estate could not be used or enjoyed in a manner that would result in the destruction of the other. Spurlock v.

Santa Fe Pacific R.R. Co., supra at 308. 3/ The Arizona Court of Appeals then endorsed a distinction between ownership of a mineral and the mineral owner's right to utilize the surface to produce the mineral. Citing with approval the Alabama Supreme Court decision in Bibby v. Bunch, 58 So. 916, 176 Ala. 585 (1912), the Arizona Court of Appeals concluded this distinction is critical because it

> gives ownership of commercially valuable substances distinct from the soil to the mineral to the mineral owner. Yet it also recognizes that rights incidental to that mineral ownership are not unlimited. Thus, * * * the mineral estate owner must not destroy or substantially interfere with the surface owner's right to use and enjoy his land by the mining or taking of minerals.

Spurlock v. Santa Fe Pacific R.R. Co., supra at 310.

The pleadings filed by the parties focus on the definition of the term "minerals." The Simpsons contend the "entire surface of lots 1 and 2, that is the soil itself, consists principally of sand and gravel" (Statement of Reasons (SOR) at 15 (emphasis in original)). They reason that the Arizona Court of Appeals found that a general mineral reservation "comports with the general intention of the parties to sever the mineral from the surface estate. It gives the ownership of commercially valuable substances distinct from the soil to the mineral owner." Spurlock v. Santa Fe Pacific R.R. Co., supra at 310 (emphasis added). They conclude that for the land in question the sand and gravel is not distinct from the soil but is the soil, and therefore they acquired the sand and gravel as part of the surface estate (SOR at 15-16).

BLM interprets Spurlock in a different manner. BLM states that the Simpsons acquired a surface estate specifically subject to the mineral interest and asserts that the reserved interest includes the sand and gravel. It notes that whether the technical definition of mineral includes sand and gravel "depends" on the circumstances of the case (Answer at 8). This argument is similar to that expressed in the line of cases finding that the term "minerals" is ambiguous, which was rejected by the Arizona Court of Appeals. See Spurlock v. Santa Fe Pacific R.R. Co., supra at 305-07.

3/ The court also recognized that if the surface and mineral estates are to coexist and retain their individual value, there must be some accommodation between the respective owners. Unless the grant or reservation specifically authorized surface destruction by the mineral owner or identified specific minerals, the court found that development of the mineral resources must not substantially interfere with the surface owner's estate. The court stated that this was the only way the "general intention of the parties to create and enjoy two co-existing, individually valuable estates" could be given effect. Id. at 309.

In our view, the parties have mistakenly placed emphasis on the term "minerals." In Spurlock, the Spurlocks, who owned the surface estate, charged the owners of the mineral rights with conversion of helium the mineral estate owners had extracted from deposits underlying the Spurlocks' land. In this case, the Simpsons, who owned the surface rights, sought assurance from BLM, the mineral rights owner's management agency, that BLM would not claim ownership if the Simpsons were to enter into a contract for the extraction, removal, and sale of sand and gravel. The consideration addressed in Spurlock that is controlling in this case is the manner of enjoyment contemplated by the grantor when the split estate was created. As stated by Kuntz:

> The manner of enjoyment of the mineral estate is through extraction and removal of substances from the earth, whereas the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment should be taken into account in arriving at the proper subject matter of each estate. [Emphasis supplied.]

Spurlock v. Santa Fe Pacific R.R. Co., supra at 308-09. If the sand and gravel is to be extracted and sold, it is a mineral under Arizona law. On the other hand, when it is used and treated as soil it is part of the surface estate. The Simpsons sought to extract and remove sand and gravel. The use and enjoyment of the sand and gravel in the manner contemplated in this case clearly rests with the owner of the mineral estate.

The Simpsons' actions also belie a claim that extraction of the sand and gravel found in Black Rock Wash would result in the destruction of the surface estate. If total destruction would ensue, the Simpsons would have sought to sell the land in Black Rock Wash, rather than to enter into a contract for the extraction, removal, and sale of the mineral material extracted from that area. 4/

There has been no attempt to mine outside of the Black Rock Wash area and BLM has stated that the only potential intrusion on the surface estate is limited to Black Rock Wash, because there is a commercially valuable substance in the wash that is distinct from the soil itself (Answer at 13-14). We therefore find it unnecessary to attempt to interpret the provision in the Land Co. deed retaining "the right of ingress and egress and of prospecting, developing and operating said land therefore, and removing the same therefrom" under Arizona law. It could well be that, if the surface owners objected to the extraction of the sand and gravel outside the

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4/ The record indicates that the extractive process may have enhanced the value of the Simpsons' property. The Simpsons were attempting to use the property to grow native trees prior to the mining. The reclamation requirements called for reclamation permitting the construction of a catchment basin for water to support a number of trees.

wash because it would result in the destruction of the surface, making it unsuitable for surface use, the Arizona courts would refuse to allow mining.

[3] The Simpsons seek attorney fees and expenses under the Equal Access to Justice Act (EAJA). This request must be denied. Section 203(a)(1) of the EAJA, 5 U.S.C. § 504(a)(1) (1994), provides for the award of attorney fees and expenses to the prevailing party in an "adversary adjudication." The EAJA defines the term "adversary adjudication" as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a licence." 5 U.S.C. § 504(b)(1)(C)(i) (1994): see also 43 CFR 4.602(b). By its terms 5 U.S.C. § 554 (1994) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain exceptions not relevant here. The definition of "adversary adjudication" in 43 CFR 4.603(a) parallels the language of section 554, and adds: "These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." There was no adversary adjudication in this case, so there can be no award of fees and other expenses. Herbert J. Hansen, 119 IBLA 29 (1991).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified, and attorney fees are denied.

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R. W. Mullen
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge